

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUSSEX COUNTY COURTHOUSE  
GEORGETOWN, DE 19947

January 11, 2010

Tyrone Drummond  
SBI# 00  
James T. Vaughn Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977

RE: *State of Delaware v. Tyrone Drummond*, Def. ID# 0606022334 (R-3)

DATE SUBMITTED: October 21, 2009

Dear Mr. Drummond:

Pending before the Court is the third motion for postconviction relief which defendant Tyrone Drummond ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). This is my decision denying the motion.

Defendant was tried before a jury on October 26, 2006. The testimony established that after an undercover police officer and a confidential informant approached defendant about buying crack cocaine, defendant took them to his cousin's house where the transaction was completed. The jury convicted defendant of charges of delivery of cocaine and possession of drug paraphernalia.

Defendant appealed to the Supreme Court. Defendant raised the following issues:

a) the jury was biased in favor of the State's witnesses because they were State troopers; b) there was insufficient evidence presented at trial to support his

convictions; c) an unidentified informant's failure to appear at trial violated his constitutional right of confrontation; d) the chain of custody of the physical evidence was broken; and e) the Superior Court imposed an excessive sentence.

*Drummond v. State*, 931 A.2d 436, 2007 WL 2066788, at \*\*2-3 (Del. July 19, 2007) (TABLE).

The Supreme Court ruled as follows. As to argument a), the transcript did not provide support for this conclusory allegation, and thus, the argument was meritless. *Id.* at \*2. Argument b) was meritless. *Id.* As to argument c), the right of confrontation was not implicated. Defendant had the opportunity to cross-examine the police officers. The informant was not present because the Superior Court had ruled, during a *Flowers* hearing, "that the informant's testimony would not materially aid the defense because he/she was not in a position to offer exculpatory evidence." *Id.* at \*3.<sup>1</sup> The Supreme Court ruled the Superior Court did not err or abuse its discretion in reaching this determination and thus, the argument failed. *Id.* As to argument d), since no evidence supported defendant's claim, the argument was meritless. *Id.* Finally, argument e) was meritless because the sentence was within statutory limits. *Id.* The mandate for the Supreme Court's decision is dated August 6, 2007.

On April 14, 2008, defendant filed his first motion for postconviction relief wherein he argued defense counsel was ineffective in a number of ways. The Court ruled he failed to establish ineffective assistance of counsel and denied defendant's motion. *State v. Drummond*, Del. Super., Def. ID# 0606022334 ( R-1), Stokes, J. (April 30, 2008). On appeal, the Supreme Court concluded defendant's appeal was without merit and affirmed the Superior Court's

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<sup>1</sup>Specifically, the Superior Court ruled that even though the confidential informant was present during the drug transaction, he/she did not participate in the transaction and his/her testimony could not materially aid the defense as that testimony would be inculpatory, not exculpatory. *State v. Drummond*, Del. Super., Def. ID# 0606022334, Graves, J. (Oct. 12, 2006) (letter decision).

decision on the postconviction motion. *Drummond v. State*, 962 A.2d 916, 2008 WL 4989125 (Del. Nov. 25, 2008) (TABLE).

On February 12, 2009, defendant filed his second motion for postconviction relief. In that motion, he set forth two grounds for relief. They were: 1) “Chain of Custody of the physical evidence was broken between the time the drugs were seized during control buy and the time the evidence bag was received by the Office of the Chief Medical Examiner in Wilmington, Delaware” and 2) “State’s primary witness committed perjury to obtain probable cause to arrest.” The Court denied the motion on procedural grounds.<sup>2</sup> *State v. Drummond*, 2009 WL 638514 (Del. Super. March 5, 2009). Specifically, it ruled the motion was time-barred since it was filed

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<sup>2</sup>The applicable procedural bars of Superior Court Criminal Rule 61(i) are as follows:

*Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant’s rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

over a year after the judgment of conviction was final, the chain of custody argument was barred pursuant to Rule 61(i) (4), and the perjury claim was barred pursuant to Rule 61(i) (2) and (3). The Court further ruled that none of the exceptions which could overcome the procedural bars applied. Defendant's appeal of this decision was dismissed as untimely filed. *Drummond v. State*, 972 A.2d 311, 2009 WL 1302673 (Del. May 12, 2009).

On October 19, 2009, defendant filed his third motion for postconviction relief. He sets forth four basic grounds of relief. As will be discussed more thoroughly below, all of the claims are procedurally barred for several reasons. Defendant is well-aware of what is required to overcome the procedural bars as the Court set forth these requirements in its ruling on his second motion for postconviction relief. The "interest of justice" exception would provide defendant relief from the bars contained in Rule 61(i) (2) and (4). That exception is a narrow one. To invoke that exception, defendant must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him." *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990). In order to overcome the bars of Rule 61(i) (1), (2) and (3), defendant must show that he had "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." Rule 61(i) (5). However, that fundamental fairness exception also is a narrow one and has been applied only in limited circumstances. *Younger v. State*, 580 A.2d 552, 555 (Del. 1990). An example of such a circumstance is "when the right relied upon has been recognized for the first time after the direct appeal." *Id.*

I now turn to defendant's claims.

Claim 1) Trial counsel was ineffective because of "ill prepared [sic] strategies." In particular, he argues that trial counsel failed to ground her motion seeking the

disclosure of the confidential informant on the case of *Butcher v. State*, 906 A.2d 798 (Del. 2006) (“*Butcher*”).

Claim 2) The Superior Court abused its discretion when it denied counsel’s motion regarding the confidential informant.

Both claims are time-barred. Super. Ct. Crim. R. 61(i)(1). The claims also are barred on other grounds. Claim 1) is barred by Rule 61(i)(2). Claim 2) is barred by Rule 61(i)(4).

Defendant seeks to invoke an exception to the procedural bars with his contention that *Butcher* was “new” law which now should be applied. Basically, in *Butcher*, the Supreme Court directed that trial courts interview the confidential informant himself or herself during the *in camera Flowers* hearing.

*Butcher* is not “new” law which gives rise to relief from the procedural bars. *Butcher* was existing law when this matter was proceeding. In fact, trial counsel and the trial court followed *Butcher*. When trial counsel filed her motion seeking the *Flowers* hearing, she cited *Butcher* and attached a copy of the decision to her motion. *State v. Drummond*, Del. Super., Def. ID# 0606022334, Docket No. 14. When the trial court held the hearing, it met with the informant *in camera*. *State v. Drummond*, Del. Super., Def. ID# 0606022334, Graves, J. (Oct. 12, 2006) (letter decision). The interview was in accordance with *Butcher*. Thus, even if the procedural bars were overcome, this claim is completely meritless.

Claim 3) The Superior Court abused its discretion when it gave the jury a “must instruction”, taking away from the jury the essential element of its function.

Defendant sets forth a rather confusing argument about the jury instruction issue. It appears he is objecting to any language telling the jury it “must” reach a conclusion. He argues that this issue has not been formerly adjudicated under Rule 61(i)(4). This claim is time-barred. Super. Ct. Crim. R. 61(i)(1). It also is barred by Rule 61(i)(2) and (3). Defendant argues it should

be considered in the interest of justice and to prevent a miscarriage of justice. Defendant does not advance any arguments which establish any of the exceptions to the procedural bars. This claim is denied.

Claim 4) The Medical Examiner failed to perform “the drug conversion rule” which caused him to be sentenced more severely.

Defendant argues the Medical Examiner should have determined what portion of the drug was actual cocaine and what was mixture. He argues that the omission of that step affects whether he violated the applicable criminal statute. He argues that this issue has not been formerly adjudicated under Rule 61(i)(4). This claim also is time-barred. Super. Ct. Crim. R. 61(i)(1). Furthermore, it is barred by Rule 61(i)(2) and (3). Defendant argues it should be considered in the interest of justice and to prevent a miscarriage of justice. Defendant does not advance any arguments which establish any of the exceptions to the procedural bars. This claim is denied.

In light of the foregoing, I deny defendant’s claims as procedurally barred.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary’s Office  
John W. Donahue, IV, Esquire  
Office of the Public Defender